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IN THE

Supreme Court of the United States

OCTOBER TERM 1970

No. 1026

FENTON, *et al.*,

Appellants,

—v.—

BOSTON SCHOOL COMMITTEE,

Appellee.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

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In the

Supreme Court of the United States

October Term 1970

No. ———

Fiorvit, et al.,

Appellants,

—v.—

Boston School Committee,

Appellee.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Judicial Court of Massachusetts, entered on July 3, 1970, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinions Below

The opinion of the Supreme Judicial Court of Massachusetts is reported at 260 N.E.2d 676 (Mass. Edition). The opinion of the Superior Court for Suffolk County, is unreported. Copies of the opinions are set out in the Appendix, *infra*, pp. 2a and 14a.

Jurisdiction

This suit originated through a bill in equity and petition for declaratory judgment filed by appellants in the Superior Court, Suffolk County, Massachusetts, on September 24, 1968. The judgment of the Superior Court was entered January 6, 1969. On appeal, the judgment of the Massachusetts Supreme Judicial Court affirming the decision of the Superior Court was entered on July 3, 1970. Notice of Appeal to the Supreme Court of the United States was filed in the Supreme Judicial Court of the State of Massachusetts on September 30, 1970. On September 29, 1970, Mr. Justice Brennan granted a timely application to extend appellants' time to file their jurisdictional statement to and including October 31, 1970. On October 22, 1970, Mr. Justice Brennan again granted a timely application to extend appellants' time to and including November 30, 1970.

The jurisdiction of the Supreme Court to review this decision on appeal is conferred by Title 28 U.S.C., Section 1257(2).

Statutes Involved

TENURE OF TEACHERS

> Every school committee, in electing a teacher . . . who has served in its public schools for the three previous consecutive school years . . . shall employ him to serve at its discretion. . . . A teacher or superintendent not serving at discretion shall be notified in writing on or before April fifteenth whenever such person is not to be employed for the following school year. Unless

said notice is given as herein provided, a teacher or superintendent not serving at discretion shall be deemed to be appointed for the following school year.

Mass. G. L., c. 71, Section 41, as amended through St. 1956, c. 132.

DISMISSAL OF TEACHERS

The school committee may dismiss any teacher, but no teacher . . . shall be dismissed unless by a two-thirds vote of the whole committee. In every such town a teacher or superintendent employed at discretion under the preceding section shall not be dismissed, except for inefficiency, incapacity, conduct unbecoming a teacher or superintendent, insubordination or other good cause, nor unless at least thirty days, exclusive of customary vacation periods, prior to the meeting at which the vote is to be taken, he shall have been notified of such intended vote; nor unless, if he so requests, he shall have been furnished by the committee with a written charge or charges of the cause or causes for which his dismissal is proposed; nor unless, if he so requests, he has been given a hearing before the school committee which may be either public or private at the discretion of the school committee and at which he may be represented by counsel, present evidence and call witnesses to testify in his behalf and examine them; nor unless the charge or charges shall have been substantiated; nor unless, in the case of a teacher, the superintendent shall have given the committee his recommendations thereon. . . .

Mass. G. L., c. 71, Section 42, as amended through St. 1966, c. 185.

SUSPENSION OF TEACHERS

The school committee may suspend any teacher, but no teacher shall be suspended for more than ten days . . . unless by a two thirds vote of the whole committee. In every such town a teacher . . . employed at discretion under section forty-one shall not be suspended, under the provisions of this paragraph, except for unbecoming conduct or other good cause, nor unless at least seven days exclusive of customary vacation periods, prior to the meeting at which the vote is to be taken, he shall have been notified of such intended vote; nor unless, if he so requests, he shall have been furnished by the committee with a written charge or charges of the cause or causes for which the suspension is proposed; nor unless, if he so requests, he has been given a hearing before the school committee which may be either public or private at the discretion of the school committee and at which he may be represented by counsel, present evidence and call witnesses to testify in his behalf and to examine them and to cross-examine other witnesses; nor unless the charge or charges shall have been substantiated; nor unless, in the case of a teacher, the superintendent shall have given the committee his recommendations thereon. No teacher . . . shall be suspended for a period exceeding one month, nor shall such teacher or superintendent receive compensation for any period of lawful suspension. No teacher . . . shall be interrogated prior to any notice given to him relative to a hearing on suspension unless he is notified of his right to be represented by counsel during any such investigation.

The school committee, a superintendent or any other school official designated for the purpose, by the superintendent, may, notwithstanding any provision of this section to the contrary, suspend for a period of not more than seven days a teacher for unbecoming conduct or for any other cause which such committee, superintendent or official deems adequate.

Added by St. 1966, c. 185, section 3. Amended by St. 1968, c. 156.

Mass. G. L., c. 71, Section 42D (St. 1966, c. 185, Section 3, as amended by St. 1968, c. 156).

Questions Presented

1. Whether appellants, as non-tenured public school teachers, were constitutionally entitled to procedural due process prior to their suspension and dismissal.

2. Whether there is a substantial likelihood that appellants' dismissal was based upon activities which are protected by the First Amendment.

3. Whether a statutory scheme which grants procedural rights to tenured teachers but withholds them from non-tenured teachers violates the equal protection clause.

Statement of the Case[1]

The appellants were employed by the school committee as teachers in the Boston public schools for the school year beginning September 1, 1968, and ending August 31, 1969. None of the appellants was serving "at discretion" (i.e., "on tenure") as that term is defined in G. L. c. 71, §41. Though all the appellants had been employed by the school committee in the previous school year (App., *infra*, pp. 5a-6a), none of them had been notified by April 15, 1968, that they were not to be employed for the next school year, as required by G. L. c. 71, §41, as amended (*supra*, pp. 2-3) (*ibid.*). Each of the appellants was assigned to the Christopher Gibson School (Gibson School), an elementary school in the Dorchester district of Boston. The number of pupils registered at the Gibson School for that year was approximately 400, of whom over ninety percent were of the black race. The Gibson School had become the focal point of a controversy concerning the extent of direct community participation or control which should be exercised or allowed in the schools. Each of the appellants were in favor of enlarged community control over the operations of the Gibson School and had evidenced this view in many different ways, including a letter to a newspaper (Exhibit 6), a petition (Exhibit 10), and by taking part in many meetings with members of the community espousing such views (App., *infra*, p. 15a).

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[1] The Statement of the Case is taken verbatim from the opinion of the Supreme Judicial Court of Massachusetts. The Statement, however, is supplemented by a number of undisputed facts of record. Those supplementary facts are each supported by appropriate references to the record.

On September 4, 1968, the first day of classes, a demonstration took place at the Gibson School, in which various persons not connected with the school (except that some appear to have been parents of children in the school) entered the school building and each classroom, claiming to be the new principal and school staff. Appellants took no part in these events (App., *infra*, pp. 16a-16aa).

On the next day, September 5, the demonstrators returned. Police had been stationed at the door of the school to prevent the entry of unauthorized persons. Some of the demonstrators went behind the school to the yard where the children were being assembled for the start of classes, and announced that there would be no school that day at the Gibson School. Almost all the children were then led by the demonstrators to the Robert Gould Shaw House, a community center. The appellants, without informing, consulting with, or obtaining the consent of the superiors at the school, accompanied the demonstrators and the children to the Shaw House (described as a "liberation school") and conducted their classes there for the entire day. Appellants had no prior knowledge that the parents intended to take their children to the Shaw House (App., *infra*, p. 12a). They considered it their primary duty to teach the students wherever they were, even if that meant accompanying them to the Shaw House (Tr. 344).[2]

The appellants reported to the Gibson School on the next morning, September 6, but were refused admittance. They were informed that they had been suspended for seven days by the Superintendent of Schools for unauthorized absence

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[2] The symbol "Tr." refers to the transcript of proceedings in the Superior Court which is part of the record on appeal.

on September 5.[3] The appellants continued to teach at the Shaw House, where a considerable number of students from the Gibson School were still being taught.

On September 6, the school committee notified the appellants of a hearing "on your suspension" to be held on September 11. No additional notice of charges against the appellants was given. The appellants, who were represented by counsel at the September 11 hearing, requested a continuance and a public hearing. The committee voted to terminate the appellants' contracts effective thirty days after delivery of notice, and to suspend the appellants for those thirty days for "conduct unbecoming teachers." The committee also voted to give the appellants a closed hearing on September 25. No guidelines, ground rules, notice of charges or other procedures for the projected hearing were adopted or announced (Exhibit 1). Prior to the committee vote of September 11th, there was no discussion by appellants with the members of the school committee, despite a request for such a discussion (Tr. 493). Nothing in the record or transcript indicates that any members of the committee acted on anything but hearsay information (Exhibit 1).

The appellants declined to attend the September 25th hearing and instead instituted suit.[4]

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[3] The appellants have waived any claim that this initial suspension was unlawful.

[4] The Supreme Judicial Court of Massachusetts, in footnote 3 of its opinion, says (App., *infra*, p. 4a):

"Because of the lack of notice of the specific charges against the plaintiffs, the judge did not treat the plaintiffs refusal to attend the offered hearing on September 25 as a waiver of the right to a hearing."

The Superior Court held that appellants were not entitled to any hearing and that Sections 42 and 42D were not unconstitutional, either as written or applied (App., *infra*, p. 25a). Though finding that appellants "were not in any way penalized by the committee for such views [concerning enlarged community control] or for the exercise of their constitutional right of free speech and association" (App., *infra*, p. 15a), the court characterized all of the events as "lawless action of a group which went far beyond the outer limits of protest and dissent" (App., *infra*, p. 20a). In support of that conclusion, the court quoted at length from Justice Fortas' "Concerning Dissent and Civil Disobedience" and from an article by an officer of the American Bar Association (App., *infra*, pp. 20a-24a). The court concluded that "Those who play with the matches of anarchy often burn their own fingers" (App., *infra*, p. 24a).

The Supreme Judicial Court of Massachusetts affirmed the decision of the Superior Court.

How the Federal Questions Were Raised

Appellants challenged the constitutionality of Sections 42 and 42D on due process and equal protection grounds in their Bill in Equity and Petition for Declaratory Judgment, as amended (Record before the Supreme Judicial Court of Massachusetts, pp. 4, 9-10) and also challenged on the same constitutional grounds the denial of a due process hearing prior to their dismissal (*ibid.*). These constitutional claims were expressly considered and rejected by both courts below (App., *infra*, *passim*).

The Questions Are Substantial

Three claims of constitutional deprivation flow from the appellants' dismissal without benefit of a hearing: procedural due process, freedom of speech, and equal protection. While these claims are analytically discrete, they are in fact very much interdependent. Thus, the claim that the appellants were entitled to a hearing is informed throughout by the free speech implications of their dismissal; and, in turn, the force of their claim that they have been denied the equal protection of the laws is very much intensified by the constitutional strength of their due process claim. The arguments below are ordered to best facilitate their understanding in light of this interconnection.

I.

Appellants were constitutionally entitled to procedural due process prior to their suspension and dismissal.

Despite statutory language which could easily be interpreted otherwise, the Supreme Judicial Court of Massachusetts has held that the appellants, as non-tenured teachers, are vulnerable to suspension and summary dismissal without any of the basic elements of procedural due process. Its rationale, drawn from an erroneous reading of *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886 (1961), was that government employees are simply not entitled to notice or hearing of any sort upon the occasion of their public employer's decision to discharge them. Appendix, *infra*, pp. 10a-12a. Such a blanket denial of due process ignores and conflicts with the constitutional equation which has been articulated by this Court. Moreover,

it would effectively deny public employees of all substantive constitutional rights in connection with their employment, an especially odious result where the right to free expression of public school teachers may be involved.

There is no all-or-nothing litmus test of entitlement to due process:

> "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' Joint Anti-Fascist Refugee Committee v. McGrath, 341 US 123, 168, 95 L Ed 817, 852, 71 S Ct 624 (1951) (Frankfurter, J., concurring), and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. Accordingly, as we said in Cafeteria & Restaurant Workers Union v. McElroy, 367 US 886, 895, 6 L Ed 2d 1230, 1236, 81 S Ct 1743 (1961), 'consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.' See also Hannah v. Larche, 368 US 420, 440, 442 (1960)." *Goldberg* v. *Kelly*, 25 L. Ed.2d 287, 296 (1970).

The professional interests of the appellants which were at stake in their dismissal were, of course, of great magnitude. Dismissal from the Gibson School necessarily included exclusion from the entire Boston school system. *Downey* v. *School Committee of Lowell*, 305 Mass. 329,

25 N.E.2d 738 (1940). The circumstances of dismissal could seriously impair the professional reputations enjoyed by the appellants. Suspension and dismissal triggered by "conduct unbecoming a teacher" constitute potent condemnation, and could well jeopardize the employment opportunities of the appellants outside the Boston district. The interests of an individual in his professional reputation and in effective access to the practice of his chosen profession have carried great weight in the due process balance. See, e.g., *Birnbaum* v. *Trussell*, 371 F.2d 672 (2d Cir. 1966); *Meredith* v. *Allen Cty. War Mem. Hosp. Com'n*, 397 F.2d 33 (6th Cir. 1968); and *Scott* v. *Macy*, 349 F.2d 182 (D.C. Cir. 1965). The effect of appellants' dismissals goes still further, and in fact approaches the circumstance in which an individual is excluded from his chosen profession. See *Greene* v. *McElroy*, 360 U.S. 474 (1959).

But beyond their great personal stake as committed teachers, the appellants in the case at bar had vital constitutional interests which could only be protected in the context of a hearing at which their basic procedural rights were respected. The appellants have alleged that their dismissal was in contravention of their right to free expression. Their complaint in this regard presents a specific instance of a general proposition: substantive constitutional guarantees are mere abstractions unless supported by the procedural opportunity to identify their violation. Recognition of this truism has been the explicit basis for the judicial extension of procedural rights to non-tenured teachers in the public employ: "Substantive constitutional protection for a university professor against non-retention in violation of his First Amendment rights or arbitrary non-retention is useless without procedural safeguards."

Roth v. *Board of Regents*, 310 F. Supp. 972, 979-80 (1970). See also, Van Alstyne *The Demise of Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439, 1451 (1968).

It follows from this observation that the more constitutionally "sensitive"—that is, vulnerable to infringement of esteemed constitutional freedoms—a given regime is, the greater is the need to infuse that regime with the safeguards of due process. The school has been recognized to be a place where the cultivation and preservation of free expression assume an especially high priority. See *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967), and *Tinker* v. *Des Moines Community School Dist.*, 393 U.S. 503, 512 (1969).

In contrast, no consideration of weight militates against affording due process to non-tenured teachers in appellants' position. Surely the Committee has no cognizable interest in arbitrary dismissals or in infringing upon the First Amendment rights of the teachers under its direction. See *Roth* v. *Board of Regents*, *supra*, at 979. While considerations of flexible and frank teacher evaluation may weigh somewhat against the requirements of due process where the issue is the contract renewal of a non-tenured teacher, they have no bearing whatsoever on a situation like that in the case at bar, where the mid-term dismissal of teachers for specific acts of misconduct is undertaken.

In point of fact, most federal courts which have confronted the question have extended procedural rights to non-tenured public teachers, even where the issue has been the non-renewal of an annual contract. See, *Ferguson* v. *Thomas*, Dkt. No. 2-8227 (5th Cir. 1970); *Lucas* v. *Chap-*

man, Dkt. No. 27687 (5th Cir. 1970); *Sindermann* v. *Perry*, Dkt. No. 28372 (5th Cir. 1970); *Roth* v. *Bd. of Regents*, 310 F. Supp. 972 (W.D. Wis. 1970); *Gouge* v. *Joint School Dist. No. 1*, 310 F. Supp. 984 (W.D. Wisc. 1970); and *Orr* v. *Trinter*, C.A. No. 70-163 (S.D. Ohio 1970). And in *Lucia* v. *Duggan*, 303 F. Supp. 112 (D. Mass. 1969), a federal district court held that constitutional considerations required a school district operating under exactly the same statutory regime as that involved here to grant procedural due process prior to the dismissal of a teacher for alleged misconduct.

This view is not unanimous, however, and involves a conflict among the Circuits. See *Freeman* v. *Gould Special School Dist.*, 405 F.2d 1153 (8th Cir. 1969), cert. denied, 396 U.S. 843.

II.

Appellants' dismissal may well have been based upon activities which are protected by the First Amendment guarantees of free expression.

The appellants, in the proceedings below, maintained that their summary dismissal constituted a denial of their right to free expression. In rejecting this claim, the Supreme Judicial Court of Massachusetts relied on the following "finding" of the trial Court:

> The petitioners, and each of them, were in favor of enlarged community control over the operations of the Gibson School and had evidenced this view in many different ways, including a letter to a newspaper (Exhibit 6) and a petition (Exhibit 10) and taking part

> in many meetings with members of the community espousing such views. I find the petitioners were not in any way penalized by the Committee for such views or for their exercise of their constitutional rights of free speech and association. None of the actions of the Committee hereinafter set forth were based in whole or in part thereon. Appendix, *infra*, p. 15a.

The most that this finding can be said to encompass—apart from a sweeping conclusion of law—is the factual proposition that the letter to the newspaper and petition of appellants were not the basis of their dismissal. Such a proposition by no means voids the appellants' First Amendment claim.

The trial court made other findings which, far from negating First Amendment objections to the dismissals, lend them weighty support. The court found that it was the action of leaving the Gibson School on September 5th which triggered the appellants' dismissal. Finding 26, Appendix, *infra*, p. 24a. That action, in the language of *United States* v. *O'Brien*, 391 U.S. 367, 381-82 (1968), clearly had both a "communicative" and "non-communicative" aspect. One may assume *arguendo*, that the Committee could dismiss the appellants on the stark basis of a willful refusal to meet their classes on a given day. Nevertheless, to the extent that it was the "communicative" aura of their conduct which motivated the Committee, their dismissal was unconstitutional. If the Committee objected primarily to the appellants' having openly sided with those who favored community control of the schools in this dramatic fashion, or was otherwise responding to the political context or implications of the walk-out and teach-in,

then the dismissal of appellants was in retaliation for the "communicative" aspect of their conduct and barred by the strictures of the First Amendment. If engendered by the unjustified absence of the appellants, the dismissal was arguably legitimate; if engendered by their presence elsewhere because of the community control controversy, it most certainly was not.

A school board may not penalize its teachers for speech activities, however critical of the board and its policies they may be. *Pickering* v. *Board of Education*, 391 U.S. 563 (1969). Neither can it seize upon the admixture of protected and non-protected activity as a means of striking out against that which is protected. To hold otherwise would be to reward deviousness in speech repression. See *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936).

Far from negating the inference that the Committee dismissed appellants because of the political content and context of their acts on September 5th, the trial judge all but found this to be the case. In focusing upon the events of that day, the judge began by announcing that "[t]he unhappy events set forth above grew out of the lawless action of a group which went far beyond the outer limits of protest and dissent." This statement was followed by lengthy quotations from tracts on civil disobedience. These in turn are concluded by the following finding:

> "It is inescapably clear that the petitioners, and each of them, knowingly elected to turn their backs upon their public employer, the City of Boston, and to cast their lot with those seeking to disrupt the very school they were bound by contract to serve. They accomplished this purpose by absenting themselves from

> their assigned place of employment in defiance of their duty assignments made by their superiors in the School Department. Those who play with the matches of anarchy often burn their own fingers. Such is true in the case at bar as to the petitioners." See Appendix, *infra*, p. 24a.

In light of the trial judge's opinion, infused as it is with support for the claim that the Committee responded primarily to the political content of appellants' actions on September 5th, and absent any specification of charges, or hearing, or record of deliberations, it must be acknowledged that there is at least the very substantial likelihood that appellants' dismissal was in retaliation for constitutionally protected activity. Appellants are therefore entitled to a due process hearing before the school committee so that the grounds for their dismissal can be made explicit. See *Street* v. *New York*, 394 U.S. 576 (1969).

III.

The denial of procedural rights to non-tenured teachers denied appellants the equal protection of the laws.

By distinguishing between tenured and non-tenured teachers in the granting of procedural rights, the Massachusetts legislature created a classification which violates the equal protection clause. The selective deprivation of constitutional rights intensifies the constitutional harm. Only "a *compelling* state interest" can justify a disparity of treatment involving a fundamental right like that of procedural fairness. See *Shapiro* v. *Thompson*, 394 U.S. 618, 638 (1969); see also, *Dandridge* v. *Williams*, 26 L. Ed.2d 491, 501, n. 16 (1970).

The only basis for treating tenured and non-tenured teachers differently proffered by the Court below was that teacher evaluation necessarily includes subtle and diffuse variables which do not readily reduce to "proof at a hearing or to review by the judiciary." Appendix *infra* at p. 10a. This argument may be of some force in the context of a decision by a school agency to rehire a non-tenured teacher at the end of his or her contractual term of a year. But where the action involved is a mid-term disciplinary dismissal or suspension predicated on a specific alleged malfeasance, this consideration is of no weight at all. No conceivable reason for depriving the non-tenured teacher of the procedural rights afforded the tenured teacher exists in such a situation.

CONCLUSION

For the reasons set forth above, jurisdiction should be noted.

Respectfully submitted,

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November 30, 1970

APPENDIX

COMMONWEALTH OF MASSACHUSETTS.

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,

AT BOSTON, July 3, 1970.

IN THE CASE OF

ANNE DECANIO & others

vs.

SCHOOL COMMITTEE OF BOSTON

pending in the Superior Court for the County of Suffolk

ORDERED, that the following entry be made in the docket; viz.,—

Appeals dismissed.

BY THE COURT,

/s/ FREDERICK J. QUINLAN, CLERK.

July 3, 1970.

A true copy,

Attest:

FREDERICK J. QUINLAN
Clerk of the Supreme Judicial Court
for the Commonwealth
September 18, 1970.

BRIEF STATEMENT OF THE GROUNDS AND REASONS OF THE DECISION:

See opinion on file.

Opinion of Supreme Judicial Court of Massachusetts

S-7314

ANNE DECANIO & others[1] *vs.* SCHOOL COMMITTEE OF BOSTON.

KIRK, J. This is a bill for declaratory relief under G. L. c. 231A brought by six public schoolteachers in Boston against the school committee. The bill contains prayers requesting that the dismissal of the plaintiffs by the school committee be vacated, that the court declare "the rights, duties and status of the . . . [plaintiffs] as employees of the Boston School System," and for other equitable relief. The plaintiffs appealed from what was in effect an order for decree.

The basic facts of the dispute are these. The six plaintiffs were employed by the school committee as teachers in the Boston public schools for the school year beginning September 1, 1968, and ending August 31, 1969. None of the plaintiffs was serving "at discretion" (i.e. "on tenure") as that term is defined in G. L. c. 71, § 41. Each of the six was assigned to the Christopher Gibson School (Gibson School), an elementary school in the Dorchester district of Boston. The number of pupils registered at the Gibson School for that year was approximately 400, of whom over ninety per cent were of the black race. The Gibson School had become the focal point of a controversy concerning the extent of direct community participation or control which should be exercised or allowed in the schools. On September 4, 1968, the first day of classes, a demonstra-

[1] Constance L. Egan, Sandra Fenton, Charna Heiko, Mary Ellen Smith, and Mary McDonough.

tion took place at the Gibson School, in which various persons not connected with the school (except that some appear to have been parents of children in the school) entered the school building and each classroom, claiming to be the new principal and school staff. On the next day, September 5, the demonstrators returned. Police had been stationed at the door of the school to prevent the entry of unauthorized persons. Some of the demonstrators went behind the school to the yard where the children were being assembled for the start of classes, and announced that there would be no school that day at the Gibson School. Almost all the children were then led by the demonstrators to the Robert Gould Shaw House, a community center. The six plaintiffs, without informing, consulting with, or obtaining the consent of the superiors at the school, accompanied the demonstrators and the children to the Shaw House (described as a "liberation school") and conducted their classes there for the entire day.

The plaintiffs reported to the Gibson School on the next morning, September 6, but were refused admittance. They were informed that they had been suspended for seven days by the superintendent of schools for unauthorized absence on September 5.[1] The plaintiffs continued to teach at the Shaw House, where a considerable number of students from the Gibson School were still being taught.

On September 6, the school committee notified the plaintiffs of a hearing "on your suspension" to be held on September 11. No additional notice of charges against the plaintiffs was given. The plaintiffs, who were represented

[1] The plaintiffs have waived any claim that this initial suspension was unlawful.

by counsel at the September 11 hearing, requested a continuance and a public hearing. The committee voted to terminate the plaintiffs' contracts effective thirty days after delivery of notice, and to suspend the plaintiffs for those thirty days for "conduct unbecoming teachers." The committee also voted to give the plaintiffs a closed hearing on September 25. The plaintiffs declined to attend that hearing and instead instituted this suit. The judge ruled that the plaintiffs, as probationary teachers not serving at the discretion of the school committee, had no statutory or constitutional right to a hearing.[4] The order for decree declared that the plaintiffs "were properly and lawfully dismissed from their employment as teachers by the . . . School Committee . . . on September 11, 1968, and are not entitled to reinstatement as teachers in the School Department of the City of Boston."

1. We are faced at the outset with a jurisdictional question not raised by the parties. No final decree was entered in the Superior Court. It is settled that an appeal from an order for decree has no standing. G. L. c. 214, § 19. *Carilli* v. *Hersey*, 303 Mass. 82, 87. *Moodie* v. *Jenks*, 329 Mass. 332. *Galvin* v. *Bay State Harness Horse Racing & Breeding Assn. Inc.*, 343 Mass. 520, 522. See *George R. Whitten, Jr. Inc.* v. *County Commrs. of Essex*, 352 Mass. 579, 580-581. Since no bill of exceptions was filed or allowed, the plaintiffs' exceptions are not open to review. G. L. c. 231, § 113. *Sullivan* v. *Roche*, 257 Mass. 166, 170.

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[4] Because of the lack of notice of the specific charges against the plaintiffs, the judge did not treat the plaintiffs' refusal to attend the offered hearing on September 25 as a waiver of the right to a hearing.

Bourget v. *Holmes*, 297 Mass. 25, 26, 27. *Joyce* v. *Hickey*, 337 Mass. 118, 119. The issues, however, have been fully argued. There are presented questions of great importance both to the plaintiffs, who understandably desire a speedy determination of their status, and to the public. We therefore deem it advisable to express our opinion on the issues. See *Wellesley College* v. *Attorney Gen.*, 313 Mass. 722, 731; *Gallagher* v. *Board of Appeals of Falmouth*, 351 Mass. 410, 415; *Metropolitan Dist. Commn.* v. *Department of Pub. Util.*, 352 Mass. 18, 27; *City Manager of Medford* v. *State Labor Relations Commn.*, 353 Mass. 519, 524; *Beaton, petitioner*, 354 Mass. 670, 672.

2. The plaintiffs' first contention is that they were entitled to a hearing on their suspension and dismissal under the provisions of G. L. c. 71, § 41, as amended through St. 1956, c. 132, § 1, which provides in relevant part: "Every school committee, in electing a teacher or superintendent, who has served in its public schools for the three previous consecutive school years, . . . shall employ him to serve at its discretion . . . . A teacher or superintendent not serving at discretion shall be notified in writing on or before April fifteenth whenever such person is not to be employed for the following school year. Unless said notice is given as herein provided, a teacher or superintendent not serving at discretion shall be deemed to be appointed for the following school year." The plaintiffs argue that the last two sentences of § 41 establish a special status for teachers who are "not serving at discretion" but are "deemed to be appointed for the following school year." Each of the plaintiffs had been employed by the school committee in the previous school year. None was notified

by April 15, 1968, that she was not to be employed for the next school year. The plaintiffs argue that, since they were "deemed to . . . [have been] appointed" for the 1968-1969 school year, the school committee did not have the authority to suspend or discharge them summarily.

The plaintiffs' argument lacks merit. It was long "the law that a school committee could discharge a teacher at any time. St. 1844, c. 32. *Knowles* v. *Boston*, 12 Gray, 339. The changes made by . . . [G. L. c. 71, §§ 41, 42] in securing permanency of tenure and requiring certain procedure for a valid discharge relate only to teachers who are 'on tenure,' and do not apply to one employed for a single year." *Pulvino* v. *Yarmouth*, 286 Mass. 21, 24. See *Nester* v. *School Comm. of Fall River*, 318 Mass. 538. The last sentence of § 41 was added by St. 1953, c. 372. That sentence does not purport to grant any new rights to a hearing, or to establish any intermediary status between "tenure" and "nontenure" teachers. It provides merely that the absence of notice to the contrary by April 15 constitutes an election (see G. L. c. 71, § 38) of the teacher for the following year. When taken together with the preceding sentence, its effect is to relieve the school committee of the burden of notifying every nontenure teacher of his reappointment, and also to afford those teachers who are not reappointed adequate opportunity to make plans. There is no express abridgment of the power of the school committee to dismiss or suspend during the school year a teacher who has been elected but is not serving "at discretion." "Where in the past the Legislature has limited the powers of school committees it has done so in express terms (G. L. [Ter. Ed.] c. 71, §§ 38-45), and it is to be expected that a radical departure from such previous policy would

be expressed in clear language and not left to doubtful implication." *Davis* v. *School Comm. of Somerville*, 307 Mass. 354, 363. *O'Donnell* v. *Norwood*, 346 Mass. 394, 397.

3. The plaintiffs' principal contention is that their suspension and dismissal, without adequate notice of the charges against them and a prior hearing, deprived them of due process and equal protection of the laws. The gist of the argument is that a governmental agency may not constitutionally discharge *any* employee, regardless of his probationary status, without first providing him an opportunity to be heard; and that G. L. c. 71, §§ 42 and 42D, which grant the right to a hearing on discharge or suspension only to teachers on tenure, deny probationary or nontenure teachers the equal protection of the laws.

The plaintiffs cite in support of their argument a number of cases which hold that before a regulatory agency may deny a person permission to engage in a lawful occupation the agency must afford that person the opportunity for a hearing.[4] We think those cases are inapposite. What is concerned here is not an "interference with such persons' freedom of employment and business activity." *Milligan* v. *Board of Registration in Pharmacy*, 348 Mass. 491, 498. Rather it is the decision by an employer whether to continue the services of an employee who is on a probationary basis. See *Willner* v. *Committee on Character & Fitness*, 373 U. S. 96, 103 and fn. 2. See also *Cafeteria & Restaurant Wkrs. Union, Local 473* v. *McElroy*, 367 U. S. 886, 896; *Gard-*

[4] *Milligan* v. *Board of Registration in Pharmacy*, 348 Mass. 491 (right to operate pharmacy). *Goldsmith* v. *United States Bd. of Tax Appeals*, 270 U. S. 117 (right to practise accounting). *Schware* v. *Board of Bar Examrs.*, 353 U. S. 232. *Willner* v. *Committee on Character & Fitness*, 373 U. S. 96 (right to practise law).

ner v. *Broderick*, 392 U. S. 273, 277-278. Most of the cases in which the question has been considered have concluded that in the absence of a statute to the contrary a probationary teacher may be dismissed without a hearing. See, e.g., *Brooks* v. *School Dist. of Moberley, Mo.*, 267 F. 2d 733, 739 (8th Cir.), cert. den. 361 U. S. 894; *People ex rel. Fursman* v. *Chicago*, 278 Ill. 318, 325-362; *People ex rel. Thomas* v. *Board of Educ. of Chicago*, 40 Ill. App. 2d 308; *Zimmerman* v. *Board of Educ. of Newark*, 38 N. J. 65, 69-70; *Albury* v. *New York City Civil Serv. Commn.*, 32 App. Div. 2d (N. Y.) 895, and cases cited; *Rees* v. *Murray City Bd. of Educ.*, 6 Utah 2d 196. See also *Parker* v. *Board of Educ. of Prince George's County, Md.*, 237 F. Supp. 222, 227 (D. Md.), and cases cited at fn. 5, affd. 348 F. 2d 464 (4th Cir.), cert. den. 382 U. S. 1030; 78 C. J. S., Schools and School Districts, § 204, at fn. 42. Cases from other States which the plaintiffs cite were concerned with statutes markedly different from G. L. c. 71, §§ 41, 42, 42D.[8] The plaintiffs have cited only three cases which held that a probationary teacher was constitutionally entitled to a hearing. The court in *Lucia* v. *Duggan*, 303 F. Supp. 112 (D. Mass.), reviewed the dismissal of a probationary teacher by a school committee in this Commonwealth. The plaintiff in that case had been dismissed for insubordination owing to his refusal to shave his beard, and for his conduct at a hearing before the school committee. The District Court refused to declare G. L. c. 71, §§ 42 and 42D, unconstitutional as denying nontenure teachers equal protection, because "[t]here are valid reasons for treating the probationary teacher differently from the permanent teacher."

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[8] *Johnson* v. *Board of Educ.*, 101 Ariz. 268. *School Dist. No. 1* v. *Thompson*, 121 Colo. 275. *Kuehn* v. *School Dist. No. 70*, 221 Minn. 443.

Id. at p. 119, fn. 5. The court further refused to hold that the plaintiff had a constitutional right to wear a beard. *Id.* at 117. Nevertheless, the court ruled that wearing a beard was "at least an interest of his . . . which may not be taken from him without due process of law." *Id.* at 118. Since the hearing given the plaintiff by the school committee had elements of both a rule-making and adjudicatory proceeding, it was held to be lacking in due process.

In *Roth* v. *Board of Regents of State Colleges*, 310 F. Supp. 972 (W. D. Wis.), and later in *Gouge* v. *Joint Sch. Dist. No. 1*, 310 F. Supp. 984 (W. D. Wis.), a United States District Court judge in Wisconsin held that under his interpretation of the holding of *Cafeteria & Restaurant Wkrs. Union, Local 473* v. *McElroy*, 367 U. S. 886, a public school teacher or college professor, whether or not on tenure, cannot constitutionally be dismissed without notification of the reasons for the impending dismissal and the offer of a hearing. The gravamen of the holding in the *Roth* case was that "the decision not to retain a professor employed by a state university [or a teacher in a public elementary or secondary school as in the *Gouge* case] may not rest on a basis wholly unsupported in fact, or on a basis wholly without reason," 310 F. Supp. at p. 979, and that given the requirement of a reason, the professor or teacher must be afforded the opportunity to contest its basis. *Id.* at p. 980.

We are unsure of the precise constitutional basis for the holding of the District Court in the *Lucia* case. Nor are we persuaded by the reasoning of the court in the *Roth* and *Gouge* cases. As the opinion in the *Roth* case recognized, "it is reasonable that there be available a very wide spectrum of reasons, some subtle and difficult to articulate and to demonstrate, for deciding not to retain a newcomer or

one who has not yet won sufficient respect from his colleagues." 310 F. Supp. at pp. 978-979. Such reasons are not amenable to proof at a hearing or to review by the judiciary. We therefore choose to follow the greater weight of authority. We note, however, that in the instant case the judge found, on sufficient evidence, that the school committee terminated the contracts of the six plaintiffs because of their leaving the Gibson School on September 5, 1968, and that the plaintiffs "were not in any way penalized by the [c]ommittee" on account of their views on community control of or participation in the direction of the school system. Cf. *Wieman* v. *Updegraff*, 344 U. S. 183; *Slochower* v. *Board of Higher Educ. of New York City*, 350 U. S. 551; *Keyishian* v. *Board of Regents*, 385 U. S. 589; *Pickering* v. *Board of Educ.*, 391 U. S. 563.

We conclude that in providing for a hearing before dismissal or suspension of a teacher on tenure, but not for that of a probationary teacher, G. L. c. 71, §§ 42 and 42D, violate no provision of either the Constitution of the United States or the Constitution of Massachusetts. "[T]he interest of a government employee in retaining his job can be summarily denied. It has become a settled principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer." *Cafeteria & Restaurant Wkrs. Union, Local 473* v. *McElroy*, 367 U. S. 886, 896. *Vitarelli* v. *Seaton*, 359 U. S. 535, 539. See *Nostrand* v. *Little*, 58 Wash. 2d 111, 123, appeal dism. 368 U. S. 436. In *Nelson* v. *County of Los Angeles*, 362 U. S. 1, a temporary county employee was discharged without a hearing for his refusal, in violation of State law, to answer questions before a congressional subcommittee. The Supreme Court held that it was bound by the California

court's interpretation that State law permitted summary discharge in such circumstances. *Id.* at p. 6. The Court further held that the summary discharge did not violate the employee's rights under the Fifth Amendment. *Id.* at pp. 6-7. Dissenting from this latter holding, Justice Brennan conceded that, "Doubtless a probationary employee can constitutionally be discharged without specification of reasons at all; and this Court has not held that it would offend the Due Process Clause, without more, for a State to put its entire civil service on such a basis . . . ." *Id.* at p. 16.

In the case before us the Legislature chose to allow a school committee three years to evaluate the performance of a teacher before the teacher would be deemed to have proved his competence and would thenceforth be subject to dismissal only for the causes set forth in G. L. c. 71, § 42. "Manifestly one of the most important duties involved in the management of a school system is the choosing and keeping of proper and competent teachers. The success of a school system depends largely on the character and ability of the teachers. Unless a school committee has authority to employ and discharge teachers it would be difficult to perform properly its duty of managing a school system. The statutory power of a school committee to discharge teachers has always been freely construed." *Davis* v. *School Comm. of Somerville*, 307 Mass. 354, 362. "The Legislature, moved by obvious and strong reasons, has vested the school committee with the absolute and unconditional power to agree with teachers upon their salaries to the end that high standards may be secured and maintained in the education of the youth of the Commonwealth." *Leonard* v. *School Comm. of Springfield*, 241 Mass. 325, 329-330. Moved by those same strong reasons, the Legisla-

ture chose also "to provide some degree of protection for the tenure of teachers who have served a probationary term of three consecutive school years and who are continued in employment thereafter." *Frye* v. *School Comm. of Leicester*, 300 Mass. 537, 538-539. In doing so it has abridged no constitutional right of a probationary teacher.

4. The plaintiffs contend that certain of the findings of the judge were unsupported by or contrary to the evidence. We agree that the evidence does not support the judge's finding that the plaintiffs learned on the evening of September 4, 1968, of a plan to lead the children to the Shaw House the next day. The evidence shows, rather, that the plaintiffs attended a meeting on September 4 at which were present some or all of the demonstrators who had entered the Gibson School that day; that plans were made at the meeting for the demonstrators to return to the Gibson School the next day; that on the morning of September 5, when school officials were standing at the front door, three of the plaintiffs entered the school yard by means of the fire escape; that before the children were led away at least one of the plaintiffs had frequent contact with the demonstrators standing near the front door; and that another of the plaintiffs actively participated in assembling the children and leading them to the Shaw House. The discrepancy between the findings and the evidence is harmless. Whether the plaintiffs knew of the plan the day before it was executed, whether they learned of it only minutes before, or indeed whether they joined in the plan on the spur of the moment is immaterial to the issue whether, as probationary teachers, they were entitled to a hearing.

5. The plaintiffs contend that the judge erred in excluding testimony of an expert witness. The offered testimony was to the effect that suspension and dismissal of probationary teachers without a hearing "would have no legitimate educational purpose." As we construe the testimony, it amounts to a conclusion on the ultimate issue whether G. L. c. 71, §§ 42 and 42D, are patently arbitrary. That was a question for the judge. See *Paddock* v. *Brookline*, 347 Mass. 230, 232; *Coffee-Rich, Inc.* v. *Commissioner of Pub. Health*, 348 Mass. 414.

6. We conclude that the plaintiffs were lawfully suspended and their contracts lawfully terminated by the school committee of Boston, and that the plaintiffs are not entitled to reinstatement as teachers.

Appeals dismissed.

Findings, Rulings and Order for Declaratory Judgment of Superior Court

This is a petition for declaratory judgment arising out of the dismissal of six non-tenure teachers without a hearing by the respondent members of the Boston School Committee (Committee).

Upon all the evidence, I make the following findings, rulings and Order for Declaratory Judgment:

1. Each of the petitioners had a written contract with the Committee to teach in the Boston public schools during the school year beginning September 1, 1968, and ending August 31, 1969. Such contracts (Exhibits 3A-3F) are summarized in Appendix A hereto. Those contracts executed before 1968 were applicable to such school year, since they were renewed from year to year in the absence of notice to the contrary.

2. None of the petitioners had achieved tenure as provided by General Laws, Chapter 71, or otherwise.

3. Each contract provided, in material part:

> "This contract may be terminated by either party upon thirty (30) days' notice, said notice to be delivered by certified mail, return receipt requested." *

4. Each of the petitioners was properly assigned to teach at the Christopher Gibson (Gibson) School in the Dorchester district of the City of Boston. The opening day of school for pupils was Wednesday, September 4, 1968.

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* Five (5) days in the case of petitioner Fenton.

5. The pupil registration of the Gibson School is approximately four hundred in number, of which substantially all—well over ninety per cent—are black children. The Gibson School (a grammar school) was a focal point of controversy concerning the question of community control of or participation in the operation of the public schools. This complex matter is a crucial issue in many of the large cities in the nation. It involves racial, social and political questions which are not, I repeat—are not—before this Court for determination or comment as to the merits of one side or the other.

6. The petitioners, and each of them, were in favor of enlarged community control over the operations of the Gibson School and had evidenced this view in many different ways, including a letter to a newspaper (Exhibit 6) and a petition (Exhibit 10) and taking part in many meetings with members of the community espousing such views. I find the petitioners were not in any way penalized by the Committee for such views or for their exercise of their constitutional rights of free speech and association. None of the actions of the Committee hereinafter set forth were based in whole or in part thereon.

7. Each of the petitioners reported for duty at the Gibson School on Wednesday, September 4, 1968.

8. On that morning there was a substantial number of non-school personnel in the school building and its environs for the purpose of imposing upon the Gibson School, by unlawful force and violence, their views as how the teaching of the children should be conducted and by whom, for the avowed objective of exercising community control. Their activities included physical occupation of the school building with a self-appointed school staff in place of the

duly appointed school staff. Each classroom was invaded in pursuance of this plan. Additionally, a number of men isolated the newly appointed woman principal, Mary McLaughlin, in her office. By crowding her office and by intimidation and threats, they tried to force her to leave her position as principal in favor of one of the would-be usurpers of authority. Despite the harrowing circumstances, she courageously refused to yield to the lawless pressure of her tormenters. The attempt to take over the Gibson School by mob action failed.

9. The petitioners did not take part in the events described in the preceding paragraph, but it is the backdrop against which their actions took place on the following day.

10. On the evening of Wednesday, September 4, 1968, the petitioners and others, including the leaders of the events described in paragraph 8, attended a local community meeting called to consider the Gibson situation (Exhibit 19). At that meeting the group prepared and completed a plan to lead a walkout of children from the Gibson School to a self-styled liberation school a few blocks away at the Robert Gould Shaw House (Shaw), a community center. The plan was to be executed the following day. The petitioners denied their presence at that part of the meeting and denied knowledge of such a plan. I disbelieve the petitioners. I draw the inference and find that each did in fact know of such plan and was fully aware of it and part of it on Wednesday evening, September 4, 1968, and thereafter.

11. On the morning of Thursday, September 5, 1968, the petitioners reported for duty at the Gibson School.

12. Various non-school personnel, including the leaders of the events set out in paragraphs 8 and 10, were present

at the Gibson School that morning. Chief among them were one Alfred Smith (Smith), an official of a Federally-funded (U. S. Department of Labor and U. S. Department of Health, Education and Welfare) project known as the Multi-Service Center—and one Benjamin Scott. They took the lead in disrupting entirely the operations of the Gibson School that day. Scott announced that he was the school principal. Smith, Scott and many others, acting as modern Pied Pipers of disruption, ordered and led between 300 and 325 of the school children away from the Gibson School and its environs and to the Shaw House, as planned. They thereupon set up and operated on September 5, and for some days thereafter, a school self-described as a "Liberation School."

13. On the morning of September 5, 1968, each of the petitioners, without consulting, obtaining the approval of, or informing any of their superiors at the Gibson School

or, indeed, within the Boston school system, freely, voluntarily, wilfully and intentionally left the Gibson School, to which they had been assigned by their superiors in the school system, and proceeded to the "Liberation School," where they assumed the role of teachers to those children who should have been in their respective classrooms at the Gibson School. Each was paid for her services at the Shaw House. The Shaw House school was not licensed or approved as such by any governmental agency.

14. The children thus lured away from the Gibson School were between the ages of six and ten. One of the suggested themes handed out to the petitioners and others at the Shaw House Exhibit 10, which included the following:

> "*Four Fundamental Themes for First Days of School*
> "*Change and Revolution* . . .
>
> "Projects:
>
> "(1) discuss connection between *revolution* and *evolution,* giving history of some important revolutions, explaining why they took place (to obtain some rights which the ordinary people should have had), discuss John F. Kennedy's statement about revolution: 'Those who make peaceful revolution impossible make violent revolution inevitable.' Examples, French Revolution, Mao's revolution in China, Civil Rights movement in general.
>
> "(2) discuss revolutionary tactics: peaceful means; simple marxist approach, the underground movement, infiltration of positions of power, party line, general strike, seizure of key places of power."

The petitioners denied knowledge of the preparation of these materials or the teaching of them. The evidence is insufficient to find otherwise.

15. Each of the petitioners explained her action by asserting her primary duty was to teach the children and that if this duty conflicted with her duties to her public employer, the Boston School Department, the latter must take second place.

16. The petitioners reported to the Gibson School for duty the following morning, Friday, September 6, 1968, but were refused admittance. All were informed they had been suspended for a period of seven days by the Superintendent of Schools for unauthorized absence on September 5. (See exhibit 8.) The petitioners have waived any claim such suspension was not lawful. The petitioners thereafter continued to teach at the Shaw House.

17. On September 6, 1968, each of the petitioners was notified by letter (Exhibit 5) of a hearing on "your suspension" to be held at 3:00 p.m. on September 11, 1968, at Committee Headquarters. No additional notice of charges against the petitioners was ever given by the Committee to any of them.

18. Each of the petitioners was represented by counsel before the meeting of the Committee on September 11, 1968, at which time each demanded a continuance of the hearing, and each demanded a public hearing.

19. On September 11, 1968, the Committee, by a vote of four to one, voted as follows:

"Ordered: That the contracts of employment with Anne Hooker DeCanio, Constance L. Egan, Sandra Thompson Fenton, Charna Heiko, Mary F. McDonough, and Mary Ellen Smith as teachers in the public schools of the city of Boston be and the same hereby are terminated by this Committee effective thirty days after delivery of notice of such termination; and be it further ordered that the Secretary of this Committee be and he hereby is authorized and directed to send forthwith in the name and in behalf of this Committee by certified mail, return receipt requested, to each of said teachers a notice in the following form:

Dear Madam:

"As expressly permitted by the terms of your contract of employment as a teacher in the public schools of the city of Boston, you are hereby notified that said contract is being terminated by the School Committee of the city of Boston, effective thirty days after delivery of this notice.

Yours very truly,

School Committee of the
city of Boston,
by the Secretary."

20. On September 11, 1968, the Committee, by a vote of four to one, voted as follows:

"Ordered: that Anne Hooker DeCanio, Constance L. Egan, Sandra Thompson Fenton, Charna Heiko, Mary F. McDonough, and Mary Ellen Smith be and hereby are suspended as teachers in the Boston public schools

for one month effective September 12, 1968, for conduct unbecoming teachers, and further ordered that the Secretary of the School Committee be authorized and directed to send forthwith notice of this action to each of said teachers by certified mail, return receipt requested."

21. The petitioners stipulated that each of them duly received proper notices of each of the two foregoing votes. (See Exhibits 12, 11A to 11F, and Exhibits 9, 13A-13E.)

22. On September 11, 1968, the Committee, by a further vote of four to one, voted to give the petitioners a closed hearing (rather than an open public hearing) at 1:00 p.m. on September 25, 1968. The petitioners declined to attend such hearing and instituted these proceedings.

23. The unhappy events set forth above grew out of the lawless action of a group which went far beyond the outer limits of protest and dissent. It was in complete defiance of the rule of law upon which depends the liberties of all of us, minority and majority, of every race, sect and creed. These outer limits were recently spelled out by Mr. Justice Abe Fortas of the United States Supreme Court in his work, CONCERNING DISSENT AND CIVIL DISOBEDIENCE.* His words bear study. Justice Fortas said:

"*This is the rule of law.* The state, the courts, and the individual citizen are bound by a set of laws which have been adopted in a prescribed manner, and the state and the individual must accept the courts' determinations of what those rules are and mean in

* The New American Library, 1968. Library of Congress Catalog Card #68-30685.

specific instances. *This is the rule of law*, even if the ultimate judicial decision is by the narrow margin of five to four! . . .

"The phrase 'civil disobedience' has been grossly misapplied in recent years. Civil disobedience, even in its broadest sense, does not apply to efforts to overthrow the government or to seize control of areas or parts of it by force, or by the use of violence to compel the government to grant a measure of autonomy to part of its population. These are programs of revolution. . . .

". . . But they are not protected in the use of violence. Programs of this sort, if they are pursued, call for law enforcement by police action. . . .

"Let me first be clear about a fundamental proposition. The motive of civil disobedience, whatever its type, does not confer immunity for law violation. Especially if the civil disobedience involves violence or a breach of public order prohibited by statute or ordinance, it is the state's duty to arrest the dissident. . . .

"He may be motivated by the highest moral principles. He may be passionately inspired. He may, indeed, be right in the eyes of history or morality or philosophy. These are not controlling. It is the state's duty to arrest and punish those who violate the laws designed to protect private safety and public order. . . .

"We are a government and a people under law. It is not merely *government* that must live under law. Each of us must live under law. Just as our form of life depends upon the government's subordination to law

under the Constitution, so it also depends upon the individual's subservience to the laws duly prescribed. Both of these are essential.

"Just as we expect the government to be bound by all laws, so each individual is bound by all of the laws under the Constitution. He cannot pick and choose. He cannot substitute his own judgment or passion, however noble, for the rules of law. . . . *A citizen cannot demand of his government or of other people obedience to the law, and at the same time claim a right in himself to break it by lawless conduct, free of punishment or penalty.* (Emphasis supplied)

"Some propagandists seem to think that people who violate the laws of public order ought not to be arrested and punished if their violation has protest as its purpose. By calling the criminal acts 'civil disobedience,' they seek to persuade us that offenses against public and private security should be immune from punishment and even commended. They seek to excuse physical attacks upon police; assaults upon recruiters for munitions firms and for the armed services; breaking windows in the Pentagon and in private stores and homes; robbing stores; trespassing on private and official premises; occupying academic offices; and even pillaging, looting, burning and promiscuous violence.

"We are urged to accept these as part of the First Amendment freedoms. We are asked to agree that freedom to speak and write, to protest and persuade, and to assemble provides a sanctuary for this sort of conduct. But that is nonsense."

24. As was said by Earl F. Morris, Esq., of the American Bar Association:*

> "Amid cries of 'protest', we see coercion. Amid shouts of 'dissent', we see disorder. What the persons who participate in these lawless acts seem to have forgotten is that, though their techniques might be effective for the moment, they are self-defeating because they imperil the same individual freedom they are intended to promote . . . Nathan Pusey, President of Harvard University, said they are in danger of becoming '. . . so carried away by their conviction about the rightness of their cause and so impatient with civilized procedures that they seek to restrain the freedom of expression or movement of others who may not agree with them.'
>
> "The concept of civil disobedience has been distorted in these times to justify violence and anarchy. . . .
>
> ". . . the law is and must be the supreme factor in the orderly working of society and that order, without which religion, education and civil rights cannot live, can be maintained only by adherence to the law . . . .
>
> "In our society the rule of law serves as the basis for all social action . . . The rule of law prohibits private, personal vengeance and imposes restraints on each of us, and by so doing it maintains a state of order that makes progress—for the individual as well as for society—possible. . . .

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* American Bar Association Journal, Vol. 54, July 1968, pp. 656, 657.

". . . each of us must comply with the law if we are to have an ordered society in which rights and responsibilities are concomitant. An ordered society cannot survive—and ours, strong as it is, will not survive—if each individual may determine which laws he will obey and with impunity flout those he finds distasteful. . . ."

25. It is inescapably clear that the petitioners, and each of them, knowingly elected to turn their backs upon their public employer, the City of Boston, and to cast their lot with those seeking to disrupt the very school they were bound by contract to serve. They accomplished this purpose by absenting themselves from their assigned place of employment in defiance of their duty assignments made by their superiors in the School Department. Those who play with the matches of anarchy often burn their own fingers. Such is true in the case at bar as to the petitioners.

26. I find that the Committee terminated the petitioners' contracts because of their action in so leaving the Gibson School on September 5, 1968.

Rulings

27. I rule that the conduct of the petitioners, and each of them, in leaving the Gibson School premises on September 5, 1968, was a wilful and material breach of their respective contracts with the Committee.

28. I rule that the petitioners, and each of them, are not entitled to a public hearing by the Committee with respect to their suspension or discharge.

29. I rule that the petitioners, and each of them, are not entitled to a hearing by the Committee with respect to their suspension or discharge.

30. I rule that General Laws, Chapter 71, Sections 42 et al., do not grant the right to a hearing to the petitioners on suspension or discharge.

31. I rule that Chapter 71, Sections 42 and 42D, providing for hearings for tenure teachers but not for non-tenure teachers, does not, either as written or as applied in the case at bar, offend any of the provisions of the Constitution of the United States or the Constitution of the Commonwealth of Massachusetts.

32. I rule that termination of petitioners' contracts by vote of the Committee on September 11, 1968, was lawful and proper.

33. I rule that the suspension of the petitioners for a period of thirty days by vote of the Committee on September 11, 1968, was lawful and proper.

34. Moreover, and in any event, I find and rule that each of the petitioners wilfully, voluntarily and intentionally breached her contract with the Committee by leaving the Gibson School premises without authority on September 5; that this was a material breach; and that this was justification for the Committee to terminate the contracts and each of them forthwith on September 11, 1968, as a matter of contract law, quite apart from the provisions of statutory law.

35. I find and rule that there is no justiciable controversy presented with respect to the rights of the petitioners under and by virtue of a union contract between the Committee and the Boston Teachers Union, Local 66, AFL-CIO (see Exhibits 2 and 17), and I decline to issue any declaratory judgment with respect thereto, noting, *Inter alia*, that few of the petitioners are members of the Union and that the petition fails to include the Union as a party herein.

ORDER FOR DECLARATORY JUDGMENT

36. The Clerk is directed to enter the following judgment herein:

> "It is ORDERED, ADJUDGED AND DECREED that the petitioners, and each of them, were properly and lawfully dismissed from their employment as teachers by the respondent School Committee of Boston on September 11, 1968, and are not entitled to reinstatement as teachers in the School Department of the City of Boston."

JOSEPH FORD
Justice of the Superior Court

Notice of Appeal Filed September 30, 1970

IN THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

No. 7314

ANNE DECANIO & Others,

Appellant,

—VS.—

SCHOOL COMMITTEE OF BOSTON,

Appellee.

Notice is hereby given that Sandra Fenton, Charno Heiko, Mary Ellen Smith and Mary McDonough, four of the six appellants* in the above captioned action, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts, dismissing the appeals, entered in this action on July 3, 1970.

This appeal is taken pursuant to 28 U.S.C. §1257 (2).

LAWRENCE D. SHUBOW
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15 Court Square
Boston, Massachusetts 02108
Counsel for Appellants

* Anne DeCanio and Constance L. Egan, the remaining two appellants, do not join in this present Notice of Appeal.